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Gusar Serling

Civ. Pers.

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-186700

DATE: January 19, 1977

**MATTER OF: Kelly Services, Inc. - Purchase Order For
Secretarial Services**

DIGEST: Federal Energy Administration issued purchase order to Kelly Services, Inc., for services of one secretary to avoid closing of Alaska Field Office during week when all permanent staff would be away from office. The relationship created was tantamount to that of employer-employee. Agencies should take timely and appropriate steps to prevent this situation from occurring. However, payment for services received under the extenuating circumstances present may be made since exhaustive attempts to secure services through usual channels had been unsuccessful.

This decision is in response to a request of June 9, 1976, by Mr. Lyle R. Brown, Regional Certifying Officer, Federal Energy Administration (FEA), Region X, Seattle, Washington, for an advance decision as to the allowability of a payment of invoices from Kelly Services, Inc., for professional secretarial services provided to FEA during the period of April 14 through 23, 1976.

During the week of April 5, 1976, Cherie N. Brice, Chief, Support Services Branch, FEA, Region X, was informed that the entire staff of the FEA Alaska Field Office was scheduled to be away from the office during the period April 14 through April 23. The field office was staffed with only one clerical employee, and she had requested leave for that period which could not be postponed. The remaining staff was scheduled to be away from the office during that time.

A request for certification for a temporary appointment was issued to the Civil Service Commission on April 9, 1976, so that a replacement for the one clerical employee could be hired to prevent the closing of the office during that time. On April 12, 1976, the Civil Service Commission authorized FEA to effect a temporary appointment of one clerk-typist since it had no clerical

B-186700

personnel to refer to FEA. The State Employment Agency of Alaska was contacted for a clerk-typist employee to be hired under the 700-hour appointment authority but was unable to provide any assistance. FEA also attempted unsuccessfully to obtain the detail of a clerical employee from the Bureau of Mines, the Environmental Protection Agency, the Internal Revenue Service, the Federal Aviation Administration, and the Department of Interior.

The record shows that on April 13, 1976, Purchase Order P307601460 was issued to Kelly Services, Inc., Anchorage, Alaska, for professional secretarial services for the period of April 14 through April 23, 1976, for FEA's Alaska Field Office. Ms. Brice, the officer who authorized the purchase order, stated that she utilized this method of obtaining the needed services because she was not authorized to send a Region X employee to Anchorage, Alaska; because transportation and per diem to send a clerical person from Region X to Anchorage would have cost approximately \$800, plus salary, while the Kelly Service costs were estimated at about \$400; because she was not authorized to close the Alaska Field Office; and because the same procedure had been used by the General Services Administration (GSA) in 1974 when the same circumstances arose in the FEA Alaska Field Office and GSA was issuing FEA purchase orders. Subsequently FEA received invoices from Kelly Services, Inc., for the services in the total amount of \$400.

The general rule established by decisions of this Office and the Civil Service Commission is that personal services may not be obtained on a contractual basis and must be performed by personnel employed in accordance with the civil service and classification laws. However, in prior cases where it was administratively determined by the Government agency involved that it would be substantially more economical, feasible, or necessary by reason of unusual circumstances to have the work performed by non-Government parties, and that was clearly demonstrable, we have not objected to the procurement of such work through proper contract arrangement. See 31 Comp. Gen. 372 (1952); 43 id. 390 (1963); 51 id. 561 (1972). A "proper contract" for services under such language has been recognized to be one in which the relationship established between the Government and

B-186700

the contract personnel is not that of employer and employee. See 51 Comp. Gen. 561 (1972).

The basic issue is whether a contract creates what is tantamount to an employer-employee relationship between the Government and the employee of the contractor. The criteria by which this relationship is judged are those set forth in 5 U.S.C. § 2105(a) (1970), namely, as to whether an individual is:

1. appointed in the civil service by a Federal officer or employee;
2. engaged in the performance of a Federal function under authority of law or an Executive act; and
3. subject to the supervision of a Federal officer or employee while engaged in the performance of the duties of his position.

In order to assist agencies to determine whether a contract establishes an employer-employee relationship, the Civil Service Commission has listed six elements. Those elements, which are set forth in FPM letters 300-8, dated December 12, 1967, and 300-12, dated August 20, 1968, are:

1. Performance on site.
2. Principal tools and equipment furnished by the Government.
3. Services are applied directly to integral efforts of agencies or an organizational subpart in furtherance of assigned function or mission.
4. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

B-186700

5. The need for the type of service provided can reasonably be expected to last beyond one year.

6. The inherent nature of the service, or the manner in which it is provided, requires directly or indirectly Government direction or supervision of contractor employees in order:

- a. To adequately protect the Government's interest, or
- b. To retain control of the function involved, or
- c. To retain full personal responsibility for the function supported in a duly authorized Federal official or employee.

The six elements relate principally to the third statutory criterion concerning supervision of the contractor's employee by a Federal officer or employee. That is, the proscribed supervision is frequently evidenced by these elements. The absence of any one or a number of them, however, would not mean that supervision is not permitted by the contract, or present in the actual work performance, but only that there is less likelihood of its existence.

In applying the above tests to this case, we find that many of the elements are present. While we recognize that there was no direct appointment by a Federal officer or employee, the existence of a right to supervise or actual supervision would be evidence that such an appointment should have occurred. While the individual secretary here received only minimal instructions upon reporting for duty and little actual supervision, the agency retained a right to control and supervise her. Further, the services were such as normally require the proscribed supervision, and the agency could have asked for a replacement if she had been determined to be unsatisfactory. Accordingly, our view is that the relationship created here was tantamount to that of employer-employee.

B-186700

The specific voucher may be certified for payment, however, in view of the extenuating circumstances and the indicated satisfactory performance of the services for a compensation rate that is considered to be reasonable for the type of work performed.

When faced with a potential situation such as described by the agency, appropriate and timely administrative steps should be undertaken to obtain services through the personnel system. Leave and travel assignments of employees should be scheduled in a manner to prevent a total absence of Federal personnel from the office.

We have noted from the record that several agencies in Alaska may be engaged in the practice described in this decision. Therefore, since the Civil Service Commission has the continuing responsibility to assure compliance with the Federal personnel laws, we are today furnishing the Commission with a copy of this decision.

Deputy

By [Signature]
Comptroller General
of the United States